FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH GRIGGS,
 	
    Petitioner - Appellant,
 	
  v.
 	
SUZAN HUBBARD, WARDEN,
 	
    Respondent - Appellee.
	No. 02-15701
	
	D.C. No. CV-99-00521-EJG
	
	MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Submitted June 20, 2003[**]

Before: CHOY, SNEED, and SKOPIL, Circuit Judges.

Kenneth Griggs, a California state prisoner, appeals the denial of his 28

U.S.C. § 2254 petition challenging his conviction for rape, unlawful penetration

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

with a foreign object, and false imprisonment. On appeal, Griggs argues that the

district court erred in concluding that he could not raise the issue whether the trial

court abused its discretion by admitting evidence of his prior sexual assault

because he did not exhaust that issue in his direct appeal. We have jurisdiction

pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm.

The district court granted the certificate of appealability on the issue

whether "California Evidence Code § 1108 is facially unconstitutional in that it

denies a defendant due process and equal protection." We reject Griggs's

argument that the issue whether the trial court abused its discretion in conducting

its California Evidence Code § 352 analysis of the prior sexual assault evidence is

implicit in his argument that § 1108 is unconstitutional on its face. Because the

issue whether the trial court abused its discretion is not within the scope of the

certificate of appealability, we decline to address it. See 28 U.S.C. § 2253(c); see

also Hiivala v. Wood, 195 F.3d 1098, 1102-03 (9th Cir. 1999) (per curiam).

AFFIRMED.